



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 22, 1997

Ms. Tana K. Van Hamme
The Ronquillo Law Firm, P.C.
Harwood Center
1999 Bryan Street, Suite 3450
Dallas, Texas 75201

OR97-2353

Dear Ms. Van Hammee:

On behalf of the Dallas Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110404.

The school district received a request for five items of information. You state that no documents exist that are responsive to request item two. With regard to request item five, you state that the school district has no school district-owned tracking devices, but that the school district will release to the requestor records regarding the use of school district-contracted tracking devices for the six months prior to the date of the request. You assert that the information responsive to request items one, three and four is excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.108 and 552.117 of the Government Code. You have submitted representative samples of the requested information.¹

You raise section 552.103 in regard to unspecified portions of the information. Section 552.103(a) of the Government Code reads as follows:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You assert that portions of the information relate to reasonably anticipated litigation to which the school district will be a party. You say the school district reasonably anticipates future litigation as a result of recent investigations of school district employees, managers and outside vendors doing business with the school district. You state that as a result of the investigations, school district employees have been reassigned, terminated or put on administrative leave.

Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). We believe that the school district's claim that litigation is reasonably anticipated amounts to conjecture at this point. Accordingly, we conclude that the school district may not withhold the requested information from the requestor based on section 552.103 of the Government Code.

You assert that disclosure of documents responsive to request item one will reveal the scope and extent of the school district's security measures and security investigations. You state that

the public release of this information would nullify many security measures in place to protect the physical safety of DISD personnel and students and the safety of DISD records and building security. The contract will outline work to be done by Security Information. All reports, requests for reimbursement and back-up documentation will reveal the extent and location of services performed under the contract.

The Seventy-fifth Legislature amended section 552.108 of the Government Code to read in pertinent part as follows:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
 - (1) release of the information would interfere with the detection, investigation, or prosecution of crime;

See Act of June 1, 1997, H.B. 951, § 1, 75th Leg., R.S. (to be codified at Gov't Code § 552.108). By its terms, this provision applies to “information held by a law enforcement agency or prosecutor.” The school district is not a law enforcement agency. You do not suggest that the information is held by the school district’s police department. Nor do you indicate that these records relate to an investigation of criminal conduct that the school district intends to report to the appropriate law enforcement agency. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 493 (1988). We have reviewed the information and conclude that, under these circumstances, the school district may not withhold the requested information from public disclosure based on section 552.108.

Section 552.101 of the Government Code applies to information made confidential by law, including information made confidential by statute. The submitted information includes a report of the results of a test for tuberculosis that is signed by a physician. This report is confidential and must be released only in accordance with the Medical Practice Act. *See* V.T.C.S. art. 4495b, § 5.08. The submitted information also includes an Employment Eligibility Verification Form I-9. The public release of this form is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for the enforcement of this chapter and for enforcement of other federal statutes governing crime and criminal investigations.” 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of Form I-9 pursuant to the Open Records Act is not for “purposes of enforcement” of the statutes.

Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” This provision applies to a document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). A “teacher” for purposes of section 21.355 is a person who is required to hold and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 of the Education Code, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. An “administrator” for purposes of section 21.355 is a person who is required to hold and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and who is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* After reviewing the documents, we conclude that section 21.355

is applicable to the "Employee Performance Rating" and the "Administrative Appraisal Instrument Summary Page." The school district must not release the evaluative documents covered by section 21.355 of the Education Code. Gov't Code § 552.101.

Section 552.101 also covers W-4 forms. 26 U.S.C. § 6103(a); *see* Open Records Decision No. 600 (1992). You mention W-4 forms in your letter to this office, however, the school district has not submitted tax forms to this office for review.

Section 552.101 also applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

You raise the employees' common-law privacy rights generally and also in particular for records revealing an employee's participation in a voluntary investment or deferred compensation program and for health and medical records. While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). Additionally, the doctrine of common-law privacy excepts certain financial information from required public disclosure, such as a public employee's participation in a voluntary investment program or deferred compensation plan. *See* Open Records Decision No. 600 (1992). However, the submitted samples of the requested information do not include private financial information or medical records.

Section 552.102(b) of the Government Code reads as follows:

Information is excepted from [required public disclosure] if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Thus, with the exception of the degree obtained and the curriculum pursued, the school district must not release the information on the transcripts based on section 552.102(b).

The requested material may include the home address, phone number, social security number and family information of a current or former school district official or employee. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this specific information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers,

or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the information it covers if the employee or official requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. Therefore, if the employee or official has elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code, we believe that the school district must withhold this information from required public disclosure pursuant to section 552.117.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref.: ID# 110404

Enclosures: Submitted documents

cc: Ms. Miriam Rozan
The Dallas Observer
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(w/o enclosures)